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Constitutional Law—New York State's Textbook Loan Law Not a Law Respecting an Establishment of Religion in Violation of the First and Fourteenth Amendments of the United States Constitution

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CONSTITUTIONAL LAW—NEW YORK STATE'S TEXTBOOK LOAN LAW NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

In an action brought by a local board of education to determine the validity of the New York statute[1] requiring school districts to purchase and loan textbooks to private as well as public school students, a New York Supreme Court declared the statute unconstitutional.[2] The Appellate Division reversed, finding that the members of the board lacked standing.[3] The New York Court of Appeals found that the board members did have standing but that the statute was not unconstitutional.[4] On appeal, the Supreme Court of the United States, per Mr. Justice White, *held*, that the loaning of textbooks to students attending religiously oriented private schools, had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Therefore, it was not a "law respecting an establishment of religion" in violation of the first and fourteenth amendments of the United States Constitution. *Board of Education of Central District No. 1 v. Allen*, 392 U.S. 236 (1968).

The First Amendment, which was made applicable to the states by the Fourteenth Amendment, provides, in part, that "Congress shall make no law respecting an establishment of religion."[5] This clause was included in the Bill of Rights to prevent the religious persecutions which were prevalent at the time of its adoption.[6] The clause was, in the words of Jefferson, intended to build "a wall of separation between church and state."[7] Although adopted in 1791,

1. New York Education Law § 701 (McKinney 1967 Supp.):
"1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.
"2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
"3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."
2. 51 Misc. 2d 297, 273 N.Y.S.2d 239 (Sup. Ct. 1952).
3. 27 A.D. 2d 69, 276 N.Y.S.2d 234 (3d Dep't. 1966).
4. 20 N.Y. 2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967).
5. U.S. Const. amend. I (hereinafter referred to as Establishment Clause).
6. Everson v. Board of Education 330 U.S. 1, 10 (1947); L. Pfeffer, Church, State, and Freedom 93-106, 143 (1953); J. Madison, Memorial and Remonstrance Against Religious Assessment, set forth in Everson v. Board of Education, 330 U.S. 1, 63-72 (1947) (app.). *But see* Fahy, *Religion, Education, and the Supreme Court*, 14 Law & Contemp. Prob. 73, 79-80 (1949); Corwin, *The Supreme Court as a National School Board*, 14 Law & Contemp. Prob. 3, 20 (1949).
7. S. Padover, *The Complete Jefferson* 518-519 (1943) quoted in Pfeffer, *supra* note 6, at 119.

there were no significant judicial interpretations[8] of the Establishment Clause until 1947. The Court's first full enunciation of the meaning of the Establishment Clause was in *Everson v. Board of Education.*[9] In *Everson,* a resolution by a local board of education in New Jersey provided for the reimbursement of carfare spent by parents in having their children transported by public bus to non-public schools. In holding the resolution constitutional, Mrs. Justice Black, writing for a 5-to-4 majority, argued that since the state's requirement for the education of children could be discharged by a private school[10] and since the direct benefit of the reimbursement is to the parents and children, the schools receive only indirect support from the state and therefore the statute is not unconstitutional. Based on its legislative history, the Court defined the Establishment Clause[11] to mean

> at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state.

The Court then explained that this definition did not "exclude individual[s] . . ., *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[12] Since the resolution in *Everson* is public welfare legislation, in that the education of students benefits society as a whole, and since the church receives no direct aid, the resolution "is within the State's constitutional power even though it approaches the verge of that power."[13] This definition was reaffirmed in later cases[14] and its meaning was further elaborated on by the Supreme Court in 1961:

> . . . [T]he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church;* it forbade all laws respecting an *establishment of religion.* . . . [But] the "Establishment"

8. *See* Reynolds v. U.S., 98 U.S. 145, 162; 25 L. Ed. 244 (1878); Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666 (1871); Terrett v. Taylor, 9 Cranch. 43, 3 L. Ed. 650 (1815).

9. Everson v. Board of Education, 330 U.S. 1 (1947) (hereinafter referred to as *Everson*).

10. 330 U.S. at 18 citing Pierce v. Society of Sisters, 268 U.S. 510 (1925).

11. 330 U.S. at 15.

12. *Id.* at 16.

13. *Id.*

14. School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

> Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide with tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulations.[15]

The Court expanded this in 1963, requiring neutrality on the part of the government, state or federal, in dealing with religion.[16] The test may be stated as follows:

> what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say, that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . .[17]

The definition of the Establishment Clause in *Everson* has been applied in six subsequent cases.[18] In *Illinois ex rel. McCollum v. Board of Education*,[19] decided in 1948, an Illinois statute was at issue. The statute provided for children in public schools to be released, with parental consent, from secular education classes to receive religious instruction on school premises. Pupils were required to be in either the secular or religious classrooms and their attendance in the religious-instruction classroom was to be reported to the secular teacher. This statute was held unconstitutional as being opposed to the Establishment Clause. The Supreme Court ruled that since attendance was required either in the secular-instruction classroom or the religious-instruction classroom, the state was, in effect, compelling students to receive religious training on state property. Four years later, in *Zorach v. Clauson*,[20] the constitutionality of a similar statute was in issue. Unlike the statute in *McCollum*, this statute provided that the religious instruction was to be received by the students off the school premises. Despite a vigorous dissent, the Supreme Court held the statute constitutional because the instruction was not given on the school premises. The dissent, however, argued that, even though the instruction was to be given outside the school premises, where the religious instruction was chosen the pupil's attendance was nevertheless required and therefore the state as in *McCollum* was "manipulating its compulsory education laws to help religious sects get pupils."[21]

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15. McGowan v. State of Maryland, 366 U.S. 420, 441-442 (1961).
16. School District of Abington Twp. v. Schempp, 374 U.S. 203, 215-218 (1963).
17. *Id.* at 222.
18. School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963); McGowan v. State of Maryland, 366 U.S. 420 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).
19. 333 U.S. 203 (1948) (hereinafter referred to as *McCollum*).
20. 343 U.S. 306 (1952) (hereinafter referred to as *Zorach*).
21. 343 U.S. at 318 (Black, J. dissenting). Subsequently, McGowan v. Maryland, 366 U.S. 420 (1961), held that a state statute requiring a business establishment to close on Sunday was not unconstitutional as an establishment of religion. The Court ruled that the state may enact public welfare legislation, and achieve its secular goals, although the legisla-

In 1962, in the case of *Engel v. Vitale*[22] the Supreme Court held a New York statute requiring the recital of a prayer in public schools unconstitutional. The Court stated that the immediate purpose of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and degrade religion."[23] By enacting a statute requiring the recital of a prayer, which is, as such, a religious activity, the state was breaching the Establishment Clause. In *School District v. Schempp*,[24] the constitutionality of a state statute providing for daily Bible reading in the public schools was at issue. Holding the statute unconstitutional, the Court stated that enactments which advance or inhibit religion are beyond the scope of the legislative power. By providing for Bible reading, which was clearly a religious exercise, the state was acting beyond its power.[25]

These cases from *Everson* to *Schempp* assert three "theories" for interpreting the Establishment Clause.[26] The "separation theory," which was argued for in *Everson* and *McCollum*, and followed in *McGowan*, *Torcaso*, and *Engel*, is based on the premise that government can do nothing which aids or supports religion.[27] This principle, which restricts government aid, is limited, however, to direct aid. The *Everson* Court, by allowing the state to pay for student transportation to parochial schools, was, in effect condoning indirect aid. The "neutrality theory" of *Schempp* provides that the "government may not use the religious factor as a basis for classification with the purpose of advancing or inhibiting religion."[28] Thus aid which has a secular legislative purpose and a primary effect that neither advances nor inhibits religion is neutral with respect to religion. The "accommodation theory" was expressed in *Zorach*.[29] There are certain necessary relationships between government and religion and, based on the traditions of our society, the government may accommodate itself to sectarian needs.[30] The "accommodation theory," however, was rejected by implication in the *Schempp* case eleven years later, when the neutrality test was adopted. Since the contested legislation of *Zorach* was primarily for sectarian purposes, it would have been held unconstitutional under the neutrality test although it was in the best traditions of the society. The principle of no aid or support for religion (as the basis of the "separation theory") was readopted in *Schempp* and, taken together with the neutrality test, requires that to be

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tion does, incidentally, aid some religious sects. Immediately following the *McGowan* decision, Torcaso v. Watkins, 367 U.S. 488 (1961), held a statute requiring a notary public to affirm his religious belief unconstitutional.

22. 370 U.S. 421 (1962) (hereinafter referred to as *Engel*).
23. 370 U.S. at 431 (1962).
24. 374 U.S. 203 (1963) (hereinafter referred to as *Schempp*).
25. *See supra* notes 16-17 and accompanying text.
26. P. Kauper, Religion and the Constitution 59-71 (1964).
27. *Id.* at 61.
28. *Id.* at 65.
29. *Id.* at 67.
30. 343 U.S. at 313-314.

constitutional the legislation must have a primary secular purpose which does not directly aid religion.[31]

In upholding the constitutionality of Section 701 of the New York Education Law, the Supreme Court rested its decision on *Everson*. The Court compared bus transportation with fire and police protection arguing that these services supply only incidental benefits to the church.[32] Based on the "secular purpose" test ("neutrality theory") proposed in *Schempp*,[33] which indicated approval of *Everson*, the Court found that the textbook statute has, like the transportation statute, the same "secular legislative purpose and . . . primary effect that neither advances nor inhibits religion."[34] The Court argued that since parents can constitutionally send their children to private schools to comply with the state's compulsory law, and since private schools do serve a public function by educating these children in the secular subjects, the loaning of books is an appropriate public concern. Furthermore, since the books, having been approved by public school authorities, and therefore presumably secular, are furnished to the pupils, the title remaining with the state, the financial benefits of receiving these books go only to the "parents and children, not to the schools."[35]

This point was contested by Justices Black and Douglas in their dissents. They argued that the schools do receive aid as "books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service."[36] They further pointed out that, although the school boards must approve the books loaned to the students, the parochial schools submit the titles for approval and, through political pressure, can easily get them approved.[37] Thus the state, argued Justice Black, is taxing its residents to support the agencies or religious organizations. This appropriation of public funds is linking the state to the church, a situation which the authors of the Establishment Clause sought to avoid.[38] Nevertheless, relying on its assumption that only secular books are disbursed, and the recognition that a significant and valuable role is played by private (parochial) education in "raising the national levels of knowledge, competence, and experience"[39] the Supreme Court upheld the constitutionality of the statute.

Under the Supreme Court rulings, a statute, to be constitutional, must

31. Kauper, *supra* note 26, at 66.
32. 392 U.S. at 242.
33. *See supra* note 17 and accompanying text.
34. 392 U.S. at 243.
35. 392 U.S. at 244.
36. 392 U.S. at 252 (Black, J. dissenting).
37. 392 U.S. at 265 (Douglas, J. dissenting).
38. 292 U.S. at 251 (Black, J. dissenting).
39. 392 U.S. at 247.

have a secular legislative purpose which does not directly aid religion. The statute in question in the instant case falls within the first of these requirements since it has a primary secular purpose—to aid students in obtaining an education.[40] The problem presented is whether the loan of the textbooks to parochial school students is also indirect aid to religion.

In the instant case, the Court, basing its decision on *Everson,* found the loaning of textbooks not to be a direct aid to religion and upheld its constitutionality. *Everson* decided that reimbursement for transportation to parochial schools was at the "verge" of a state's constitutional power.[41] It appears that, under the Supreme Court's tests, to determine whether or not the legislation providing indirect aid is beyond the verge of constitutionality, it must be determined whether the means of using the aid is controlled primarily by the church or primarily by the state.[42] Since the reimbursement for transportation in *Everson* was not under the control of the parochial school and was not direct aid to the church, the Court was able to uphold the statute's constitutionality.[43] The indirect control or manipulation of the aid is not of concern under the Supreme Court's present tests. By being reimbursed for transportation, the parents incur fewer expenses in sending their children to parochial school. The school could then raise its tuition to the extent of the reimbursement and thereby indirectly receive the benefit of the aid. Such a manipulation of public funds to religious use was possible under the *Everson* rationale. This aid which was not directly controlled by the church was held to be at the "verge" of the state's constitutional power. Therefore, anything beyond such aid is indirect aid which is controlled by the church and is thereby beyond the "verge" of constitutionality.[44]

The loan of textbooks, "the most essential tool of education"[45] is the type of indirect aid that is, as pointed out by the dissent, directly controlled by the parochial school. The parochial school decides the manner in which the textbooks that the students have acquired are to be used. Considered in such light, section 701 of the New York Education Law permits an indirect aid to religion which can be controlled and manipulated by the church and, under the Supreme Court's previous tests, should have been held unconstitutional.

The statute must be held unconstitutional notwithstanding the arguments that parochial schools, in part, perform the secular function of giving their

40. 392 U.S. at 243.
41. 67 U.S. at 12.
42. M. Gordon, The Unconstitutionality of Public Aid to Parochial Schools, in The Wall Between Church and State 73, 91-92 (D. Oaks ed. 1963).
43. 67 U.S. at 12. Included in permissable aid are fire and police protection, connections for sewage disposal, servicing of public highways and sidewalks as well as reimbursement of bus fare to parochial school.
44. Gordon, *supra* note 42, at 92. The "control" test is being applied only with respect to aid to parochial schools. *Id.* at 92 n.48. See *Note,* 50 Yale L.J. 917, 926 (1940). For a view opposing the "control" test see Choper, *The Establishment Clause and Aid to Parochial Schools,* Calif. L. Rev. 260, 333-337 (1968).
45. Board of Education v. Allen, 392 U.S. at 252 (Black, J. dissenting).

students the secular education that the state, but for their existence, would have been obligated to perform.[46] Although the parochial schools are relieving the state of a financial burden, it is done at the option of the parent. Parents electing to pay the tuition to send their children to parochial school apparently do so with the belief that secular and religious instruction must be intermingled.[47] (A parent could just as well have chosen to send his child to public school and to religious instruction after school hours thereby receiving the secular education free.) Many authorities feel that due to the religious atmosphere of a parochial school there will be a religious influence exerted even in the secular courses,[48] and that it is therefore possible that an allotment of textbooks, for use by students in parochial schools, will enhance their religious training even in secular courses.[49] Under such circumstances, the state would be aiding the church, and a statute authorizing such aid is clearly unconstitutional.

It appears that a logical extension of the Supreme Court's "secular purpose" test, beyond that of sanctioning the loan of textbooks to parochial school children, would allow unlimited indirect aid to parochial schools so long as the primary purpose of that aid is secular. In other words, the state could not pay for the salaries of the teachers or for the maintenance of the facilities, just as it could not directly loan the textbooks to the parochial school,[50] since these benefits would be direct aid regardless of their primary purpose. However, the state could reimburse parents for the tuition paid to parochial schools, at least as far as that tuition goes toward payment for secular education.[51] The primary secular purpose, as it was with reimbursement for bus transportation and the loan of textbooks, would be the education of children. The aid would be indirect since the parents would be the recipients, not the parochial school. This reimbursement would relieve the parents of a financial burden and, together with the reimbursement for transportation and loan of textbooks, could influence these parents to send their children to parochial schools. Such would be an aid to religion and therefore unconstitutional.

The above situation could be prevented from occurring by the use of a different test. It has been proposed that the test should be whether the aid, authorized by a statute, subsidizes the church as a religious institution in performing a religious function, either directly or indirectly, irrespective of the

46. *See* Choper, *supra* note 44; R. Drinan, *The Constitutionality of Public Aid to Parochial Schools,* in The Wall Between Church and State 55 (D. Oaks ed. 1963).

47. Pfeffer, *supra* note 7, at 427-28.

48. Even in a mathematics course, religious, rather than secular, symbols could be used as examples in instructing the students. This, with the religious symbols in the classrooms and religious garb worn by teachers, creates the religious atmosphere. *See* Gordon, *supra* note 42, at 90; *but cf.* Choper, *supra* note 44, at 297 n.229.

49. Board of Education v. Allen, 392 U.S. at 258-64 (Douglas, J. dissenting).

50. Board of Education v. Allen, 392 U.S. at 243.

51. The percentage of reimbursement could be determined by the percentage of time spent in secular education per week. However, the problem arises of separating the comingled secular and sectarian educations. *see generally* Choper, *supra* note 44.

primary purpose of the legislation.[52] This test would eliminate the subjective intent of the legislature and direct a court's attention only to the objective results of the aid. Under this test, police and fire protection, sewage disposal and highway maintenance would be allowed since these public benefits do not subsidize the church as a religious institution but rather as a property owner in the community.[53] Furthermore, distribution of school lunches, paid for by the government and distributed to children within the parochial school premises, is neither aiding the church nor children going to the church school, as such, but rather is a direct benefit to the children as children. Such a service is provided "in aid of a public function, and unrelated either to schooling or to religious purposes or religious functions."[54]

On the other hand, the loan of textbooks to the students and the reimbursement of transportation expense to parents would be a subsidy of the church as a religious institution. The governmental aid, in subsidizing textbooks, is not being given to the children as children but rather as students seeking an education. By relieving the parents of this financial burden, the government opens the way for the parochial school to raise its tuition (the parents remaining, monetarily, at the status quo) or, if the tuition remains the same, the government influences the parents to send their children to a parochial school since they would not have to incur as great an expense. This monetary benefit would accrue to the parents who send their children to parochial school, and indirectly to the parochial school itself, notwithstanding the fact that taxes may have to be increased to supply funds for the purchase, by the public board of education, of additional textbooks. The additional textbook expense would be paid for by the whole community while only a part of the community, those who send their children to parochial schools, would receive the benefit. The difference between the total cost of the textbooks and the part paid for by those parents who send their children to parochial school would be the net benefit to those parents and in turn to the parochial school. A major function of the church as a religious institution is the education of children.[55] This governmental aid would be a subsidy to the church since it would make the church better able to perform its function of education, the church having more funds and/or pupils. However, as previously discussed, it is impossible for the church to educate these students in secular subjects without a religious influence.

Thus the statute in the instant case should have been held unconstitutional, under either the "secular purpose" test of the Supreme Court or the "subsidy"

52. Dickman v. School District, 232 Or. 238, 366 P.2d 533, 542-43 (1961); Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. Pitt. L. Rev. 561, 580 (1961).

53. Everson v. Board of Education, 330 U.S. 1, 17-18; Dickman v. School District, *supra* note 52, at 542-43; Gordon, *supra* note 42, at 82.

54. Rosenfield, *supra* note 52, at 580.

55. Gordon, *supra* note 42, at 94 quoting Everson v. Board of Education, 330 U.S. 1, 24 (Jackson, J. dissenting).

test outlined above. The statute is, in effect, supporting religion and breaching the "wall of separation" that Jefferson stated the Establishment Clause built between religion and government. Religion and religious practices are private affairs and should not be supported by the public government.

JEROLD S. YALE

CONSTITUTIONAL LAW—STATE TRESPASSORY LAWS ARE INSUFFICIENT BASIS FOR ABRIDGING A UNION'S FIRST AMENDMENT RIGHT TO PICKET IN A SHOPPING CENTER.

Responding to the occupancy of a nonunion supermarket in a newly developed shopping center, members of a food employees' union picketed the supermarket, carrying signs which stated that the supermarket was nonunion and that its employees were not receiving benefits that union membership afforded. The pickets did not include any of the supermarket's employees. The picketing was conducted in that area designated as a parcel pickup area and that portion of the shopping center's parking lot which was immediately adjacent thereto. The picketing was carried on in an orderly and peaceful manner, without threats or violence. Logan Valley Plaza, Inc.,[1] the owner of the shopping center and Weis Markets, Inc.,[2] the owner of the supermarket obtained an injunction from the Court of Common Pleas of Blair County, Pennsylvania.[3] The injunction was granted based on the laws of Pennsylvania making trespass[4] on private property illegal conduct and it restrained the union from picketing upon the supermarket's parcel pickup area and the adjacent parking lot. The injunction had the practical

1. Hereinafter referred to as Logan.

2. Hereinafter referred to as Weis.

3. The rationale of the decision in the Court of Common Pleas of Blair County was twofold:

(1) that the picketing was upon private property and, therefore, unlawful in manner because it constituted a trespass (*see infra* note 4 for a definition of trespass);

(2) that the aim of the picketing was to compel Weis to require its employees to become members of the union and, therefore, the picketing albeit peaceful for an unlawful purpose.

The court relied on Wortex Mills, Inc. v. Textile Workers Union of America, C. I. O. et al., 369 Pa. 359, 85 A.2d 851 (1952) which summarized the case law: "A State Court may enjoin unlawful picketing or picketing which is conducted in an unlawful manner or for an unlawful purpose. Picketing, if peaceful, orderly and for a legitimate or lawful purpose, is legal and within the protection of the Constitution. However a State is not required to tolerate in all places and in all circumstances even peaceful picketing by an individual; it is well established that the method or conduct or purpose or objective of the picketing may make even peaceful picketing illegal." 85 A.2d at 857.

4. *See* Restatement (Second), Torts § 158 (1965):

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.